BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BILL WIETRICK	)	
Claimant	)	
VS.	)	
	)	Docket No. 237,389
DREAM HOMES, INC.	)	
Respondent	)	
AND	)	
	)	
CALIFORNIA INDEMNITY INSURANCE	)	
Insurance Carrier	)	

ORDER

Respondent appeals from a preliminary hearing Order entered by Administrative Law Judge Julie A. N. Sample on May 18, 1999.

ISSUES

The Administrative Law Judge ordered respondent to provide medical treatment with Dr. Jane K. Drazek as the authorized physician and ordered respondent to pay for prior treatment with Dr. Drazek as unauthorized medical expense. Respondent contends the Administrative Law Judge exceeded her jurisdiction because the record does not contain a copy of the seven-day notice of intent required under K.S.A. 1998 Supp. 44-534a. Respondent also contends the Administrative Law Judge exceeded her jurisdiction because she ordered treatment by Dr. Drazek without evidence that the medical care was unsatisfactory and without first allowing respondent to provide a list of three possible alternative physicians as required by K.S.A. 44-510(c)(1).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Administrative Law Judge did not exceed her jurisdiction and the Order should be affirmed.

On appeals from a preliminary hearing order, the Board has a limited review. The Board's authority is limited to review of allegations that the ALJ exceeded his/her jurisdiction. K.S.A. 1998 Supp. 44-551. This includes review of the issues identified as

jurisdictional in K.S.A. 1998 Supp. 44-534a. The issues identified as jurisdictional are whether claimant suffered accidental injury, whether the injury arose out of and the in course of employment, whether claimant gave timely notice, whether claimant made timely written claim, and whether certain defenses apply. These "jurisdictional" issues were part of the amendments in 1993. Before those amendments, appeals from preliminary hearings were limited only by the general limit found in K.S.A. 1992 Supp. 44-551, limiting the review to review of allegations that the ALJ exceeded his/her jurisdiction. It seems clear that the addition of the specific jurisdictional issues made in 1993 was primarily intended to avoid the expense of litigation where the claim might ultimately be defeated on appeal by ruling on the type of issue identified. The Board has generally construed the limits on its review of preliminary hearing orders with this intention in mind. *Parsons v. Attica Long Term Care Facility,* Docket No. 196,412, (June 1997); *Ivey v. Buckley Industries, Inc.*, Docket No. 217,041 (January 1997).

In this case, respondent argues the ALJ did not have jurisdiction because the record does not contain the proper demand or notice of intent. K.S.A. 44-534a(a)(1) provides that before filing an application for preliminary hearing, the claimant must give written notice of the intention to file an application for preliminary hearing and requires that the notice state specifically the benefit change sought. The notice of intent and a certification that the notice was sent must be attached to the preliminary hearing application. Respondent acknowledges claimant's certification that she sent the notice of intent is made part of the record but contends the ALJ did not have jurisdiction to proceed with the preliminary hearing because the notice of intent itself was not attached.[1] Respondent also states in its brief that the notice of intent which claimant did send does not mention change of physician, only unauthorized medical expense. Respondent attaches a copy of this notice of intent, dated February 25, 1999, to its brief.

The notice of intent assures that the employer will have an opportunity to address the claimant's demands and can, where it determines appropriate, avoid the litigation of a preliminary hearing. The record in this case establishes the employer had that opportunity. Claimant's counsel at the preliminary hearing introduced a letter received from respondent's insurance carrier dated March 12, 1999, denying claimant's request for change of physician and denying the request for treatment by Dr. Drazek. Claimant also introduced a copy of the "NOTICE OF INTENT/CERTIFICATION" addressed to respondent and filed with the Division on April 8, 1999, the same date as the E-3 application for preliminary hearing. This document gives notice that claimant is applying for a preliminary hearing for authorized medical expense, change of physician, and specifically for change to Dr. Drazek. This document also certifies that claimant has sent a notice of intent to file an application for preliminary hearing but that respondent has not answered.

---

[1] The Board acknowledges its prior ruling that the ALJ does not have jurisdiction in a preliminary hearing to award benefits which were not mentioned in the notice of intent. *Kane v. Westwood Animal Hospital*, Docket No. 204,483 (May 1997).

Claimant's counsel indicates and states in her brief that she not only sent the demand of February 25, 1999, but also sent a demand on February 11, 1999, specifically asking for change of physician to Dr. Drazek. Claimant attaches a copy of both to her brief.

The Board finds from this record that claimant has made an appropriate demand and given a notice of her intention to request a change of physician. Respondent had full opportunity to address and answer the demand. The ALJ did not exceed her jurisdiction when she addressed claimant's request for change of physician.

Respondent next argues that the ALJ exceeded her jurisdiction by ordering treatment with Dr. Drazek without evidence that the medical treatment was unsatisfactory and without allowing respondent to first designate three possible physicians. As respondent notes, to force a change of physicians, K.S.A. 44-510(c)(1) requires a showing that the treatment is unsatisfactory and, if that showing is made, the statute allows the employer to provide a list of three possible alternative physicians. The gist of respondent's argument is that the ALJ did not have authority to violate the statute and did not have jurisdiction to enter an order which violates the statute.

The Board has considered the position taken by respondent but has construed the limits to its review differently. In our view, jurisdiction refers to the subject matter regarding which the ALJ has authority to adjudicate and persons or entities the ALJ has authority to bind by its ruling. The workers compensation court is one of limited jurisdiction. The ALJ has jurisdiction to adjudicate issues concerning accidents arising out of and in the course of employment. Thus, whether the claimant suffered an accidental injury and whether it arose out of and in the course of employment are identified as jurisdictional issues in K.S.A. 44-534a. The ALJ exceeds his or her authority if he/she adjudicates issues involving injury which it is determined did not arise out of or in the course of employment. Other examples of jurisdictional issues include issues relating to whether the Act applies. But not every error of law or violation of statute exceeds the jurisdiction of the ALJ.

In this case, respondent did not appear for the preliminary hearing. Claimant made a proffer of the evidence which included a description of the accident and injury and a proffer that claimant would testify she had been tested, but not really treated, for this injury. The proffer indicated claimant would also testify that the condition, primarily a back injury, was becoming worse. Claimant also introduced a report from Dr. Drazek stating her conclusion that claimant had very minimal treatment and was not at maximum medical improvement. Based on the proffer, the ALJ entered the Order now on appeal. The Board does not intend here to rule on whether the ALJ is required to allow the respondent to offer three alternative physicians when the respondent does not appear at the hearing. But even if the ALJ's Order were considered to violate the statutory requirements of K.S.A. 44-

510(c)(1), the ALJ had jurisdiction of the subject matter and the parties.[2] The Order should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Julie A. N. Sample on May 18, 1999, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 1999.

BOARD MEMBER

c: Diane F. Barger, Wichita, KS
Donald J. Fritschie, Overland Park, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director

[2] Respondent does not claim it did not receive notice of the claim or hearing.